In the Supreme Court
of the United States

October Term, 1959

No. 5

HENRY L. HESS, JR., Administrator of the Estate of George William Graham, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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MISCELLANEOUS

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OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon is reported at 1958 AMC 660 (also R. 47-48). The opinion of the Court of Appeals is reported at 259 F.(2d) 285 (also R. 241-255).

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1958 (R. 255). The petition for a writ

of certiorari was filed on October 13, 1958, and was granted on March 2, 1959 (R. 256). The jurisdiction of this Court is founded upon 28 United States Code, Section 1254(1).

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act (28 United States Code, Sections 1346(b), 2671 and 2674) and the Oregon Employers' Liability Law (ORS 654.305-654.335) are set forth in the appendix infra, pages 43-47.

QUESTIONS PRESENTED

1. In a Federal Tort Claims Act death action to recover damages on account of the drowning of petitioner's decedent on the navigable waters of the Columbia River within the State of Oregon, where respondent's liability was predicated upon the failure of its employees on Bonneville Dam, a shore structure, to regulate properly the flow of water through the spillway gates, were the courts below bound to apply the statutory law of Oregon applicable to non-maritime torts in view of the Tort Claims Act (28 U.S.C. § 1346 (b)) which measures respondent's liability "in accordance with the law of the place where the [negligent] act or omission occurred"?

2. Assuming *arguendo* that the courts below were correct in ruling that the Oregon law relating to maritime torts should govern, does not this Court's decision in

Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272, compel the conclusion that the right of action for wrongful death created by the Oregon Employers' Liability Law should apply to this "twilight zone" case, where the decedent's drowning occurred in an operation which, although maritime in nature, was so "local" that his beneficiaries were awarded compensation under the Oregon Workmen's Compensation Act?

3. Assuming *arguendo* that the courts below were correct in ruling that the Oregon law relating to maritime torts should govern, does not the right of action for wrongful death created by the Oregon Employers' Liability Law constitute a permissible modification and supplementation of general maritime law so as to be applicable herein, according to this Court's decision in *The Vessel M/V Tungus v. Skovgaard*, 358 U.S. 588?

STATEMENT OF THE CASE

This civil action to recover $100,000 general damages and $941.65 special damages was instituted in the Oregon federal court under the Federal Tort Claims Act to recover for the death of petitioner's decedent, George W. Graham, a carpenter foreman, who was drowned in the Columbia River on August 20, 1954, while engaged in work under a contract between his employer and the United States covering the construction of a cofferdam and restoration of the spillway deck of the Bonneville Dam.

This case was consolidated in the trial court with similar actions brought on account of the deaths of

fellow-employees Leonard L. Boylan, a carpenter foreman, and Merle L. Tobias, a civil engineer (R. 21-22). Pursuant to stipulation and order of the Court of Appeals, appeals in these other cases have been stayed pursuant to the agreement of all parties to be bound by the instant case.

In the trial court, petitioner based respondent's liability both upon the general Oregon wrongful death statute which limits liability to $20,000 (ORS 30.020), and upon the statutory cause of action for wrongful death created under the Oregon Employers' Liability Law which contains no such statutory limit (ORS 654.325), it being petitioner's theory that in its exercise of its exclusive control over the operation of Bonneville Dam, particularly in its regulation of the turbulence of the water through the closing of enough spillway gates so as to furnish a quiet pool in which to work, respondent failed to use every device, care and precaution which it was practicable to use for the protection and safety of decedent and his fellow employees (R. 6-8).

The trial court held that the Oregon Employers' Liability Law was not applicable and that the high standard of care required thereunder, if applied to this case, would be unconstitutional under the doctrine of *Southern Pacific Co. v. Jensen,* 244 U.S. 205, and *Sanderson v. Sause Bros. Ocean Towing Co.,* 114 F. Supp. 849 (D.C. Or.) (R. 47-48, 61). Thus, the basis of the trial court's decision was that since the death occurred on navigable waters of Oregon, general maritime law governed, and that to apply the higher standard of

care prescribed by the Employers' Liability Law would work material prejudice to the uniformity of general maritime law. In so ruling, the district court purported to follow the law of the place where the accident and the resulting death occurred.

The Court of Appeals for the Ninth Circuit rejected petitioner's argument that general Oregon law applicable to non-maritime torts applied because of the directive of 28 U.S.C. 1346(b) that respondent's liability should be measured according to the "law of the place where the act or omission occurred," in view of the fact that the asserted negligent acts or omissions of the United States in controlling the spillway gates took place on the Bonneville Dam, an extension of the land.

The Court of Appeals, following its decision in *United States v. Marshall*, 230 F.(2d) 183, 187, held that 28 U.S.C. 1346(b) refers to the law of the place where the negligence became operative, directly causing injury, thus calling for the application of general maritime law. The court admitted that its view was "not in harmony with the result reached" by the Court of Appeals for the District of Columbia in *Eastern Air Lines v. Union Trust Company*, 221 F.(2d) 62, cert. den. 350 U.S. 911.

The appellate court further held that the word "place" referred to in the statute means the state in which the act or omission occurred, not a particular locality or kind of terrain. Therefore, in applying the law of a particular state, the court should include the state's conflicts of law rules and the state law to be

applied in determining whether an admiralty or non-admiralty case was presented.

Apart from this interpretation of the federal statute, the Court of Appeals also held that because of the higher than common law standard of care prescribed by the Oregon Employers' Liability Law, its application to this case would result in an "unconstitutional displacement of the essential features of general maritime law."

After the petition for a writ of certiorari was filed herein, this Court decided the cases of *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, and *The Vessel M/V Tungus v. Skovgaard*, 358 U.S. 588, both of which establish that, apart from its interpretation of Section 1346(b), the Court of Appeals erred in holding that the Oregon Employers' Liability Law was not applicable herein.

THE FINDINGS OF FACT

The facts herein were contained in a statement of agreed facts in the pretrial order on segregated issues (R. 20-29) and were restated in a stipulation (R. 34-46) filed at the time of trial. Accordingly, petitioner has no substantial quarrel with the findings of fact made by the district court (R. 48-60), except insofar as certain findings of fact are, in reality, conclusions of law drawn by the trial court from the undisputed basic facts.

The basic findings of fact made by the district court are summarized as follows:

a. On June 23, 1954, Robert C. Larson, dba Larson

Construction Company, the employer of decedent Graham, a carpenter foreman, entered into a contract with respondent (Ex. 3) for construction of a cofferdam and restoration of baffles on the south half of the spillway baffle deck of Bonneville Dam, which at all times was owned and under the control of respondent (R. 50-51).

b. The principal facilities of Bonneville Dam are a powerhouse, which lies between the Oregon shore of the Columbia River and Bradford Island, and a spillway dam, which lies between Bradford Island and the Washington shore of the Columbia River. The spillway dam contains 18 bays, in each of which there is a movable gate which is opened and closed by being lifted or lowered in a vertical direction. When shut, each gate rests upon the top of the ogee section, which is the upper line of the submerged stationary portion of the dam. On the bed of the Columbia River, extending downstream across the width of the dam, is a concrete structure called the baffle deck. The baffle deck is dotted with concrete blocks called baffles which serve to dissipate the energy of the water discharged through the dam and to reduce the downstream velocity. In the interval between the completion of the dam in 1938 and the summer of 1954, the baffle deck and baffles had been eroded by the flow of water (R. 50-51).

c. The contract contemplated that the construction of the cofferdam and restoration of the baffles would be carried on by Larson without interruption of normal power generation, and that the construction of the cofferdam would be commenced while water was being discharged through the spillway dam, until such time

as the flow of the river would recede to a point where the entire flow could be handled through the powerhouse. The contract further contemplated that Larson would inform respondent of all steps he proposed to take which would affect the operation of the spillway dam. Under the contract Larson was to supply all equipment and all labor. The contract further contemplated that the operation of the dam, including the operation of the spillway dam gates, would be conducted by personnel of respondent (R. 51-52).

d. On July 14, 1954, respondent gave Larson notice to proceed with the performance of the contract, and, thereafter, Larson commenced preliminary marshaling of equipment and construction materials on the project site. On August 13, 1954, respondent notified Larson that the water level of the Columbia River was such that he was to commence construction work on the water no later than August 23, 1954.

e. On August 13, 1954, Larson personally conferred with respondent's employee Capps, who was project superintendent in charge of the operation of the dam, regarding the possibility of closing a number of gates of the spillway dam during preliminary construction work on the cofferdam. At that time it was found possible to close gates 11 through 17, that is, all the gates on the south half of the spillway dam from gate 11 southward towards the Bradford Island side, except the fishway gate. Gates 11 through 17 were closed on August 13, 1954, and remained closed up to and after the time of the accident (R. 52).

f. On August 16, 1954, respondent's employee Leonti, construction project engineer, arrived at the dam. Among his duties was the inspection of the project during the construction by Larson in order to ascertain that Larson was performing the contract in accordance with its terms. He also acted as liaison between Larson and those employees of respondent concerned with operation of the dam. Between August 16, 1954, and August 20, 1954, Leonti familiarized himself with the project and conferred with Larson and Larson's acting superintendent, Claterbos, as to Larson's plans for carrying out the project. Leonti informed Larson that any requests by Larson for closing the gates in the spillway dam should be made through him and that he would relay such requests to the employees of respondent charged with operating the dam and its gates (R. 53).

g. According to the contract plans and specifications, a part of the cofferdam was to consist of a timber crib which was to rest in bay 9 starting at the top of the ogee curve and running at right angles to the face of the dam. The crib was to rest on the curved slope and was to be built to fit that curve as nearly as possible. The contract drawing showed the cross section of the ogee as it had been originally constructed. Larson concluded that the ogee might have been eroded to some degree and that the cross section of the ogee might not still be the same as when originally constructed. He determined that it was necessary to take soundings of the ogee in bay 9 for the purpose of establishing its true cross section. The contract specifications did not require nor refer to the taking of soundings in the project area (R. 53-54).

h. On August 18, 1954, Larson's representative informed Leonti that Larson proposed to take soundings in bay 9 on August 20, 1954. Leonti was informed that Larson intended to take a tug and barge out on the water below the dam, to push the barge into bay 9 and to take soundings off the side of the barge. Larson or his representative requested Leonti to have the gates in bays 9 and 10 closed by 12:30 p. m. on August 20, 1954, to facilitate the sounding operation. Larson did not request any gates to be closed other than 9 and 10. Leonti forwarded the request to the operations division of the dam and by 12:30 of August 20, 1954, the gates in these bays had been closed, as well as gates 11 through 17. Larson sought no advice from respondent and respondent gave no advice as to the hazards of the proposed sounding operation (R. 54).

i. On August 19, 1954, Claterbos performed a reconnaissance run in another tugboat in the same area on the Columbia River in which the accident occurred for the purpose of determining whether the proposed sounding operation was safe. Based upon this reconnaissance run and personal observation, Larson determined for himself, without seeking respondent's advice or suggestions, that the proposed sounding operation was safe (R. 54-55).

j. Shortly before 2:00 p. m. on August 20, 1954, Larson's tug and barge set out from the Bradford Island shore of the river. The equipment and personnel utilized in the proposed sounding operation were selected solely by Larson. Decedent Graham, an employee of Larson, was aboard the tug as a member of the sounding

party. He had no control with respect to the manner in which the sounding operation was to be conducted. Larson's employee Tobias, a civil engineer, was in charge of the sounding operation (R. 55).

k. The tug pushed the barge, which was made fast to tug by four steel lines. When fastened together the tug and barge were in effect a unit. The tug and barge headed downstream from Bradford Island, came about in the middle of the river and headed upstream for bay 9. As the barge came to bay 9, it veered north and the port bow of the barge struck the pier between bay 9 and bay 8, stoving a hole in the bow of the barge. As water came in through the hole, the barge moved over in front of bay 8 and the other open bays north of bay 8. The tug and barge were swamped and sunk. All aboard the tug and barge were thrown into the water and drowned with the exception of a deck hand (R. 56).

l. The immediate cause of the accident and the decedent's death was the turbulent condition of the water which made it impossible to control the movements of the tug and barge and caused the barge to strike the pier. This turbulent condition in the spillway basin was open, apparent and obvious to all. The difference in elevation of the water in the turbulent area opposite the open gates as compared with the water in the spillway basin was also visible and obvious (R. 56-57).

m. At the time of the accident, gate 8 was open two dogs so that the height of the aperture between the top of the ogee and the bottom of the gate was 32 inches; gate 7 was open three dogs so that the height

of the aperture was 55 inches: gate 6 was open two dogs so that the height of the aperture was 32 inches high. These gates were all 50 feet wide and 50 feet high. The quantity of the water being discharged from these gates was approximately as follows: 5,700 cubic feet per second from gates 8 and 6, and 9,100 cubic feet per second from gate 7. At this time the elevation of the forebay in the spillway dam was about 73.5 feet and the elevation of the tailrace below the spillway dam was 18.6 feet. The elevation of the crest of the ogee at the spillway dam was about 24 feet, as measured from a fixed reference point at the dam. At the time of the accident, the flow of the Columbia River was 191,000 cubic feet per second. Of this flow 115,000 cubic feet per second was taken through the power house, 52,300 cubic feet per second was being discharged through the spillway dam, 3,000 cubic feet per second passed over the fishway, and 800 cubic feet per second was being ponded (R. 56-57).

n. The accident and the decedent's death occurred on navigable waters of the United States within the jurisdiction of the State of Oregon (R. 58).

o. Larson was an independent contractor and was not operating under the supervision, control and direction of respondent. Respondent was under no duty by virtue of the contract to provide Larson with any materials, equipment or personnel. Respondent had no control of the details, manner or method by which the work under the contract was to be accomplished, but was interested only in the general result in conformity with the specifications of the contract. Respondent retained a mere right to inspect Larson's work as it progressed

in order to determine whether it was being completed in accordance with the plans and specifications (R. 58).

p. Larson selected his own equipment and personnel for the proposed sounding operation and determined for himself the method, manner and means by which it would be carried out. No employee of respondent participated in this operation or gave Larson or any of his employees any directions or orders concerning the sounding operation. There were no employees of respondent engaged in the sounding operation which resulted in the accident. There was no intermingling of respondent's employees with Larson's employees in connection with the work being performed at the time of the accident. Respondent was not in charge of, responsible for or engaged in the work being performed by Larson and his employees which resulted in the fatal accident. Larson's employee Tobias was the foreman in charge of and responsible for the particular work in which he and Larson's other employees were engaged at the time of the fatal accident (R. 58-59).

q. Although Larson was insured against liability for compensation under the Longshoremen's and Harbor Workers' Act, neither Larson nor the insurer had given notice to the Deputy Commissioner that such insurance was in force, and Larson had not otherwise secured the payment of such compensation. The statutory beneficiaries of petitioner's decedent, as well as those of the other decedents, applied for, were awarded and are presently receiving compensation under the Oregon Workmen's Compensation Act (R. 59-60).

SUMMARY OF ARGUMENT

1. In a Tort Claims Act case, the liability of the United States for the acts or omissions of its employees while acting in the scope of their employment is the same as that of a private person, in accordance with the law of the place where the acts or omissions occurred.

2. In the present case, respondent's liability is not governed by maritime law even though the death occurred on navigable waters. The alleged negligent acts and omissions occurred in connection with respondent's operation of the Bonneville Dam, which is merely an extension of the land. Therefore, the law of Oregon governing non-maritime torts applies.

3. Assuming *arguendo* that the court below correctly construed the Tort Claims Act, nevertheless, this Court's decision in *The Vessel M/V Tungus v. Skovgaard*, 358 U.S. 588, establishes that the entire cause of action for wrongful death created by the Oregon Employers' Liability Law may be applied to a death on territorial waters as a permissible modification and supplementation of general maritime law.

4. Assuming *arguendo* that the court below correctly construed the Tort Claims Act, nevertheless, this Court's decision in *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, has finalized Oregon law. The *Hahn* case establishes that the Oregon Employers' Liability Law may be applied in a maritime tort case as a permissible modification and supplementation of general maritime law where the worker's fatal injury occurred in an operation which was essentially "local", although maritime in nature.

5. Under the holdings in both the *Tungus* and *Hahn* cases, the Oregon Employers' Liability Law is applicable to this action.

6. Respondent was liable to petitioner's decedent under the Oregon Employers' Liability Law because (1) petitioner's decedent was employed by respondent's contractor; (2) in the course of his work under this contract, decedent was required to be in the vicinity of a hazardous condition under the control of respondent, and involving risk and danger; (3) respondent was an employer and there was a mutual economic benefit in the close relationship between respondent's employees and Larson, the employer of decedent; (4) respondent had exclusive control of the instrumentality whose operation caused the accident; and (5) it was contemplated by respondent and Larson that the said instrumentality would be actively operated and exclusively controlled by respondent during the course of the work.

7. The record establishes that respondent breached its statutory duty to petitioner's decedent under the Employers' Liability Law, and that this breach proximately caused the accident.

ARGUMENT

I

28 United States Code 1346(b) Required the Courts Below to Apply the Cause of Action for Wrongful Death Created by the Oregon Employers' Liability Law, Notwithstanding that the Death Occurred on Navigable Waters.

In the courts below, petitioner relied upon the Employers' Liability Law of Oregon (ORS 654.305 and ORS 654.325) which states in part:

> *"Protection and safety of persons in hazardous employment generally.* Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.
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> * * * * *
>
> *"Who may prosecute damage action for death; damages unlimited.* If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to

maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named."

In connection with petitioner's right to the protection of this statute, the district court found that decedent was at the time of his death a resident of Washington, that no person entitled to bring this action as a named beneficiary under ORS 654.325 was a resident of the State of Oregon, and that petitioner, as general representative, was the proper person to bring the action for the purposes of ORS 654.325 (R. 48-49).

The complaint herein alleged the necessary elements of a cause of action under the Employers' Liability Law. It was claimed that in eight separate particulars respondent failed to use every device, care and precaution practicable to be used for the protection and safety of life and limb without impairing the efficiency of the dam operation (R. 6-8).

However, the courts below held that it would be unconstitutional to apply the Employers' Liability Law. The basis of their decision was that since the death occurred on navigable waters of Oregon general maritime law governed, and that to apply the higher standard of care prescribed by the Employers' Liability Law would work material prejudice to the uniformity of general maritime law. In so ruling, the courts purported to follow the law of the place where the accident and the resulting death occurred.

However, recent decisions make it clear that Congress changed the general conflicts of law rule for Tort

Claims Act cases, and substituted the law of the place where the negligent United States employee's act or omission occurred.

In *Eastern Air Lines v. Union Trust Company*, 221 F.(2d) 62 (CA DC), cert. den. sub nom. *Union Trust Co. v. United States*, 350 U.S. 911, the United States was sued in a Tort Claims Ac case for the death of air-line passengers who lost their lives in an accident which occurred over the Potomac River which is in the District of Columbia (221 F.(2d) at p. 80, note 17). Liability was predicated upon negligent acts and omissions of airport tower operators employed by the United States. The tower was located in the State of Virginia. The Court of Appeals held that the Virginia law governed the liability of the United States. A judgment of $150,000 was reduced to $15,000 to meet the limitation imposed by the Virginia law governing wrongful death. Judge Miller, who dissented on this point, wrote (p. 80):

> "The general conflicts rule disregards the law of the place of the negligent act or omission and, instead, uses the law of the place where the injury was sustained. My brothers Edgerton and Fahy are of the view that the trial court erred in applying the general rule here because the Tort Claims Act provides in § 1346(b) that
>
> > ' * * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for * * * death caused by the negligent or wrongful act or omission of any employee of the government * * * under circumstance where the United States, if a private person, would be liable to the claimant in accordance with *the law of the place where the act or omission occurred*.' (Emphasis supplied.)

> "They hold that Congress thus provided in explicit terms for the Government's liability to be measured under the law of the place where its negligent employee's act or omission occurred, and that therefore the Act requires Virginia law to be applied in this case."

The *Eastern Air Lines* case was followed by the Court of Appeals for the Third Circuit in *Knecht v. United States*, 242 F.(2d) 929 (CA3), where Judge Goodrich stated that recovery in a Tort Claims Act case is governed by the law where the liability-creating conduct occurred.

The theory of this action is that the negligent acts and omissions of the respondent's employees did not occur on the Columbia River, but rather on land—on Bonneville Dam itself. Respondent's liability is predicated upon the failure of its employees to regulate the flow of water through the dam spillway so as to afford protection to Larson's employees in their ill-fated sounding operation. No negligent act or omission occurring on navigable waters was claimed.

Respondent's negligence in the operation of its dam was not a "maritime tort" within admiralty jurisdiction so as to be governed by general maritime law. It is well settled that a dam, like a pier, is nothing but an extension of the land. It is clearly not an "aid to navigation," but rather an obstruction to navigation. *Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F.(2d) 155, 163 (CA DC), cert. den. 315 U.S. 806. On this point it is necessary to refer only to *United States v. The Panoil*, 266 U.S. 433, holding that a spur

dike extending 700 feet into the Mississippi River must be regarded as land, and not within admiralty jurisdiction. (Accord: *United States v. Matson Navigation Co.*, 201 F.(2d) 610 (CA9), holding that a Columbia River dike owned and maintained by the United States was an extension of the land.) Thus, general maritime law had no place in this action, and the courts below should have applied the statutes and decisions of Oregon.

The necessity of determining the government's liability in a Tort Claims Act case in accordance with the law of the place where the act or omission occurred, and the fact that "place," in a case such as this, means a locality and requires a choice between general maritime law and state law, is illustrated by the decision in *Kunkel v. United States*, 140 F. Supp. 591 (S.D. Cal.). In that case, an action was brought for wrongful death arising out of alleged negligence occurring on the high seas. In dismissing the complaint without prejudice, the court held that since "the place" where the act or omission occurred was the high seas, the only law applicable was the Death on the High Seas Act which prescribed a remedy only in admiralty.

An example of the correct choice of law in an action under the Tort Claims Act arising out the deaths on navigable waters of the United States due to the negligent operation of a government dam is found in *Dye v. United States*, 210 F.(2d) 123 (CA6), where the court applied Kentucky law, rather than general maritime law.

The court below admittedly gave a different con-

struction to the statutory phrase "in accordance with the law of the place where the act or omission occurred." Following its decision in *United States v. Marshall*, 230 F.(2d) 183 (CA9), it held that "these words mean the place where the negligence, either of act or omission, 'became operative, directly causing the injury and not places where the negligence existed but was then inoperative' " (259 F.(2d) at p. 290). The court reasoned that the word "place" means the state in which the act or omission occurred, not a particular locality or kind of terrain. Further, the Court of Appeals reasoned that the "law" of the state included the state's conflicts rules and the law to be applied in determining "whether an admiralty or non-admiralty case is presented." The court justified this interpretation on the ground that otherwise the United States might be put in a less favored position than a private individual defendant.

As shown hereafter, this Court in *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, upheld a maritime tort recovery based upon the Oregon Employers' Liability Law. Thus, the *Hahn* case establishes that the Court of Appeals erred in finding that if this action had been between private persons, Oregon or federal law would have precluded the application of the Employers' Liability Law.

In any event, the decision of the Court of Appeals contradicts the clear and plain wording of the statute. It would have been easy enough for Congress to have provided that the liability of the United States was to be appraised "in accordance with law of the state where the

[negligent] act or omission became operative." However, Congress employed different language. It is not the function of the courts to twist and torture a statutory phrase so as to distort its clear and plain meaning. As stated by Mr. Justice Frankfurter in *62 Cases of Jam etc. v. United States*, 340 U.S. 593, 596, and recently reiterated by Mr. Justice Brennan in *Flemming v. Florida Citrus Exchange*, 358 U.S. 153, 166:

> "But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."

II

Recent Decisions of this Court Demonstrate that the Cause of Action for Wrongful Death Created by the Oregon Employers' Liability Law was Applicable Herein under Oregon Law as a Permissible Modification and Supplementation to General Maritime Law.

Apart from rejecting the contention that Section 1346(b) of 28 United States Code requires the application of the Oregon Employers' Liability Law, the courts below ruled that under controlling Oregon law the Employers' Liability Law could not be given effect in an action to recover damages for a drowning on navigable waters. They both held, as a matter of law, that the doctrine of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, precluded application of this Oregon statute, because the application of a higher standard of care than liability for

ordinary negligence would result in "an unconstitutional displacement of the essential features of general maritime law" (R. 47, 259 F.(2d) at p. 292).

The recent decisions of this Court in *The Vessel M/V Tungus v. Skovgaard,* 358 U.S. 588, and *Hahn v. Ross Island Sand & Gravel Co.,* 358 U.S. 272, demonstrate, on two separate grounds, that the Oregon Employers' Liability Law constituted a permissible modification and supplementation to general maritime law and should be applied in this case.

FIRST: The *Tungus* case is a direct holding that the *Jensen* doctrine is not offended by the application of a local death statute where the death has occurred, as here, upon state territorial waters. More important, this Court held that a state death statute must be enforced in admiralty "as an integrated whole, with whatever conditions and limitations the creating State has attached" (358 U.S. at pp. 592-3):

> "The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

In rejecting the contention that the application of liability under a state wrongful death statute to determine rights arising from a death in state territorial waters is destructive of the uniformity of federal maritime law, Mr. Justice Stewart wrote (358 U.S. at p. 594):

> "Even Southern P. Co. v. Jensen, which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 US 205, at 216. It would be an anomaly to hold that a State may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. Cf. Caldarola v. Eckert, 332 US 155, 91 L ed 1968, 67 S Ct 1569."

It follows that the cause of action for wrongful death under the Employers' Liability Law (ORS 654.325), as created by the Oregon legislature[1], if otherwise applicable, must be applied in its entirety as "an integrated whole." The enforcement of a higher standard of care with respect to liability for death on Oregon territorial waters does not offend the doctrine of the uniformity of federal maritime law.

In any event, to apply any body of Oregon law to this case results in a disruption of the uniformity of maritime law to a certain extent. The application of the Oregon Wrongful Death Act brings into the general maritime law the complete defenses of contributory negligence, assumption of risk and negligence of a fellow servant. The incidents of the Employers' Liability Law are much closer to principles applied in admiralty courts, and its application leads to less disruption of "uni-

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[1] ORS 654.325 is not a survival statute, but creates a new cause of action which accrues only upon the date of death *Piukkula v. Pillsbury Flouring Co.*, 150 Or. 304, 42 P.(2d) 921, 44 P.(2d) 162; *Hansen v. Hayes*, 175 Or. 358, 154 P.(2d) 202).

formity" than do the incidents of the Oregon Wrongful Death Act. A comparison of the legal relationships involved in the application of common law, maritime law and Employers' Liability Law shows that the greater kinship is between general maritime law and the Employers' Liability Law:

Incident	*Common Law*	*Martime Law*	*Employers' Liability Law*
Contributory negligence	Complete defense	Mitigation of damages	Mitigation of damages
Assumption of risk	Complete defense	Mitigation of damages	No defense
Negligence of fellow servant	Complete defense	No defense	No defense
Degree of care	Ordinary care in circumstances	Ordinary care in the circumstances, or strict liability (unseaworthiness)	High care

In the instant case, the degree of care required would not greatly vary because ordinary care in the circumstances is a high degree of care.

The Court of Appeals rejected this argument on the ground that the benefit to a litigant in utilizing the Employers' Liability Law, rather than the Oregon Wrongful Death Act, resulted in an "unconstitutional displacement of the essential features of general maritime law" (259 F.(2d) at p. 292). However, as the above chart clearly shows, the characteristic features of general maritime law are consistent in every particular with the Employers' Liability Law of Oregon. How this affects a particular case is immaterial; the important criterion should be whether or not the incidents of the statutory cause of action are hostile to the characteristic features of general maritime law.

This appears to be the viewpoint of the commentator of the Harvard Law Review in reviewing this case (72 Harv. Law Rev. 1363, 1366):

> "A difference in result, however, no matter how frequent or how extreme, does not appear to require rejection of a state statute which is not opposed to a principle of maritime law and the application of which would not produce undesirable disuniformity. If a statute has been enacted in substantially similar form in nearly all jurisdictions, little disuniformity would result from its application. In determining whether a less widely accepted statute may validly be applied, it seems that the severity and extent of the disparity which would be produced should be weighed against the policy behind the particular state law.
>
> "The Supreme Court has tended in recent cases to allow the application of state law when it is in accord with enlightened developments but to reject state statutes which would impose outmoded restrictions. On the basis of such decisions it is arguable that the Employers' Liability Law, since in accord with the modern trend of employers' tort liability, should be a permissible supplement to the maritime law, even though, in earlier cases, similar statutes were held inapplicable."

SECOND: If the correct law to be applied in this Federal Tort Claims Act case be Oregon law, then the controlling Oregon decision is *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, reversing 66 Or. Adv. Sh. 117, 320 P.(2d) 668 (Ore. Sup. Ct.). That was an action for personal injuries brought under the Oregon Employers' Liability Law by an employee of Ross Island who was injured on a barge lying in navigable waters of the Willamette River at Portland, Oregon. Hahn was employed as an "oiler" on a dredge anchored to the shore.

The dr dge was used to scoop sand and gravel from the bottom of a lagoon and dump it on a barge. He repaired the machinery on the dredge and operated a winch to move the barge into position. At the time of the accident, he was assisting in the transfer of a large hopper from one barge to another. While climbing a ladder attached to the hopper, the ladder separated from the hopper and fell upon him.

A jury verdict in Hahn's favor was set aside and judgment entered in the trial court on the ground that his sole remedy was under the Longshoremen's and Harbor Workers' Compensation Act. The Oregon Supreme Court affirmed the judgment.

This Court reversed and held that since Hahn's injury occurred in that "twilight zone" of Longshoremen's Act coverage in which an injured waterfront employee has an election to recover either under the federal or the state compensation law, the negligence action for damages permitted by the Oregon Workmen's Compensation statute was available to him, in view of the fact that his employer had elected to reject compensation coverage.

Thus, this Court has finalized the Oregon law and sustained liability under the Oregon Employers' Liability Law, even though the accident occurred on navigable waters. The Court further recognized that the application of both the Oregon Workmen's Compensation statute and the Employers' Liability Law was not precluded by *Southern Pacific Co. v. Jensen,* in a "twilight zone" case, where the worker's injury occurred in an operation which was "local," although maritime in nature.

Under the doctrine of the *Hahn* case, the older decisions of this Court must be examined to determine whether decedent's drowning occurred in an operation which, although maritime in nature, was essentially "local" in character. It is undisputed that petitioner's decedent was employed as a carpenter foreman (R. 21-22). He was a member of a sounding party sent by his employer to determine the true cross section of the ogee or curved slope of the submerged stationary portion of the dam (R. 50, 54, 55). The purpose of the soundings was to assemble data preliminary to the construction of a cofferdam (R. 53-54).

Thus, the decedent's employment and his employer's activities bore no direct relationship to navigation or commerce, but were purely of a local concern and confined to the repair and restoration work on the Bonneville Dam.

Two decisions of this Court are closely in point. In *Miller's Indemnity Underwriters v. Braud*, 270 U.S. 59, a judgment for benefits under Texas compensation statutes was affirmed on the ground that the claim arose out of a maritime tort, but that "the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law" (270 U.S. at pp. 64-65). There, the decedent was employed as a diver by a shipbuilding company. He submerged himself from a floating barge anchored in a navigable river for the purpose of sawing off the timbers of an abandoned set of ship launching ways. His death was caused by suffocation on account of a failure of air supply.

In *The State Industrial Board of N.Y. v. Terry & Tench Company,* 273 U.S. 639, this Court in a *per curiam* memorandum opinion, relying solely upon the *Braud* case, reversed the New York Court of Appeals' decision dismissing a claim for benefits under the New York compensation act. From the opinion of Cardozo, J. (240 N.Y. 292, 148 N.E. 527), it appears that the claimant was employed in the construction of a pier and was injured while standing on a floating raft in navigable waters.

Thus, the only difference between the claimant in the New York case and petitioner's decedent is that the New York claimant was injured in the construction of a pier, while this decedent was employed in the repair of a dam, both being extensions of the land.

Furthermore, the finding that Hahn's injury occurred in the "twilight zone" would appear to make the instant case *a fortiori* on that point. Hahn was on a barge which was loading interstate cargo, and the work he was doing at the time of his injury was practically the same work as performed by longshoremen. Many decisions hold that the loading of a barge is a purely maritime matter and not one of local concern (see cases collected in *Martinson v. State Industrial Accident Commission,* 154 Or. 423, 60 P.(2d) 972). On the other hand, petitioner's decedent, a carpenter foreman, had no duties pertaining to the tug and barge in which he was riding at the time of his death. His employment was non-maritime and the operation out of which the accident arose bore only the most remote or incidental relationship to navigation or commerce.

In this connection, the Court of Appeals fell into error in stating ". . . here it cannot be doubted that the activities in which decedent was engaged had a direct relation to navigation and commerce" (259 F.(2d) at footnote 4, pp. 289-290). In support of this statement, the court stated that the dam had been recognized "as an aid to navigation" by the Supreme Court of Oregon in *Atkinson v. State Tax Commission,* 156 Or. 461, 62 P.(2d) 13, 67 P.(2d) 161, aff'd 303 U.S. 21. The court also quoted the preamble of Section 1 of the Bonneville Project Act of August 20, 1937, 50 Stat. 731, 16 U.S.C. 832, which commences "For the purpose of improving navigation on the Columbia River and for other purposes incidental thereto . . ."

However, an examination of the *Atkinson* case, as well as the statutes authorizing the Bonneville Project, demonstrates that the so-called aid or improvement to navigation related to the construction of the locks and ship canal, as well as raising of the river level behind the dam. However, by its very nature, the dam itself is an obstruction rather than an aid to navigation. While such things as beacons and pile clusters have been termed aids to navigation since they are not connected with the land, a dike or a dam has never been considered to be in this category as far as admiralty jurisdiction is concerned. The mere fact that its presence affects the flow of the waters of the Columbia River and thereby ultimately facilitates navigation is not a sufficient basis on which to predicate a conclusion that a spillway dam repair project on the Bonneville Dam bears a direct relation to navigation and commerce (Cf. *United States v. The Panoil,* 266 U.S. 433, 434).

Finally, it is interesting to note that in the *Hahn* case this Court was of the opinion that Hahn's injury occurred in the "twilight zone" and that recovery for it could have validly been provided under the Oregon Workmen's Compensation Act. In the instant case, it is undisputed that pursuant to application the statutory beneficiaries of the decedent were awarded and are presently receiving compensation under the state compensation law (R. 59-60). This recognition of the "twilight zone" character of the accident by the Oregon authorities is entitled to be given weight by this Court (see *The Vessel M/V Tungus v. Skovgaard,* 358 U.S. 588, 590, footnote 4, and see discussion in 72 Harv. L. Rev. at pp. 1368-1369).

Of course, the question remains as to whether, under the findings of fact made by the district court, respondent breached a duty owed to petitioner's decedent under the provisions of the Employers' Liability Law of Oregon. Having held the law not to be applicable, the Court of Appeals deemed it unnecessary to determine whether respondent would be liable to petitioner, if the statute were applied (259 F.(2d) footnote 9, p. 292).

The Oregon statute applies to ". . . all owners, contractors and subcontractors and other persons having charge of, or responsible for, any work involving risk and danger to the employees" (ORS 654.305). It is settled Oregon law that the protection under the Act is afforded to employees of others as well as a person's own employees. The leading decision on this point is *Pacific States Lumber Co. v. Bargar,* 10 F.(2d) 335, 336 (CA9), where Judge McCamant held:

"The Oregon Employers' Liability Law is designed to protect employes. An action for damages under the statute will not lie at the instance of one who is not an employe carrying on his work at the place where he is injured. Turnidge v. Thompson, 89 Or. 637, 653, 175 P. 281; Saylor v. Enterprise Electric Co., 106 Or. 421, 436, 212 P. 477. Every employer whose work involves risk or danger is required by the statute to take the required precautions, not only for the protection of his own employes, but also for the protection of employes of others whose duties bring them within reach of the dangers and risks of such work. The Supreme Court of Oregon has so construed the statute, and this construction is binding on the federal courts. Clayton v. Enterprise Electric Co., 82 Or. 149, 161 P. 411; Cauldwell v. Bingham & Shelley Co., 84 Or. 257, 155 P. 190, 163 P. 827; Rorvik v. North Pacific Lumber Co., 99 Or. 58, 70, 190 P. 331, 195 P. 163."

The *Bargar* case was cited by the Oregon Supreme Court in *Walters v. Dock Commission,* 126 Or. 487, 266 P. 634, 270 P. 778, and part of the language above quoted was adopted by the Oregon court in *McKay v. Pacific Building Materials Co. et al.*, 156 Or. 578, 68 P.(2d) 127.

The law on this subject was recently summarized by the Oregon Supreme Court in *Byers v. Hardy,* 68 Or. Adv. Sh. 557, 337 P.(2d) 806, 809:

"The Employers' Liability Act makes no provisions for a so-called third party action similar to that found in the Workmen's Compensation Act. It is only the reference of risk and danger to 'the public' (ORS 654.305) which permits such an action to be brought at all. This court has consistently held that it is not every member of the public that is thus protected. It is only those whose

employment or duties require them to be about machinery of an employer other than his own or whose duties may require such person to expose himself in or about hazardous conditions or structures of such other employer which are prohibited or circumscribed by the Act. It must be a hazard or risk which the employer has created or permits to exist and which is within the control of the employer sought to be held. There must likewise be a commingling of function or duty of the injured person and the employes of the employer. In other words, the acts or omissions of the employer which give rise to a cause of action in behalf of an injured member of the public require active and direct participation on the part of the employer. Turnidge v. Thompson, 89 Or. 637, 175 P. 281; Rorvik v. North Pac. Lumber Co., 99 Or. 58, 190 P. 331, 195 P. 163; Drefs v. Holman Transfer Co., 130 Or. 452, 280 P. 505; Myers v. Staub, 201 Or. 663, 272 P.2d 203."

The Oregon decisions touching upon the various requirements that must be satisfied before a plaintiff can sue a third person not his own employer under the Employers' Liability Law are numerous and complex in their particular factual settings. However, the following rules of law may be adduced from these cases:

1. *Status of a Plaintiff.*

(a) A plaintiff must be an employee of someone, and he must sustain a relation towards a defendant that is different from that of a member of the public. (*Drefs v. Holman Transfer Co.*, 130 Or. 452, 280 P. 505; *Rorvik v. North Pacific Lumber Company*, 99 Or. 58, 190 P. 331, 195 P. 163; *C. D. Johnson Lbr. Co. v. Hutchens*, 194 F.(2d) 574 (CA9).

(b) In this case, petitioner's decedent was an employee of Larson. His relationship to respondent was different from that of a member of the general public since at the time of his death he was engaged in work on respondent's premises in furtherance of a contractual obligation which his employer had undertaken for respondent (R. 50-56).

2. *Duties of a Plaintiff.*

(a) A plaintiff's duties must require him to be present or to work in the vicinity of the hazardous condition which caused his injury or death, and his duties at the time of his injury must be hazardous and involve risk or danger. (*Rorvik v. North Pacific Lbr. Co.* (supra); *Drefs v. Holman Transfer Co.* (supra); *McKay v. Pacific Building Material Co.* (supra); *Byers v. Hardy* (supra))

(b) In the instant case, the decedent's duties required him to work in the immediate vicinity of the turbulent water in the dam spillway which obviously involved risk and danger, and which was the immediate cause of the acciden and his death (R. 56).

3. *Status of a Defendant.*

(a) A defendant must be an employer and there must be some common purpose or mutual economic benefit in the relationship between a defendant and plaintiff's employer. (*Drefs v. Holman Transfer Co.*, (supra); *Coomer v. Supple Investment Co.*, 128 Or. 224, 274 P. 302; *Myers v. Staub*, 201 Or. 663, 272 P.(2d) 203)

(b) Concededly, respondent was an employer of persons who operated Bonneville Dam, and the mutual economic benefit and common purpose between respondent and Larson arose out of the contract which Larson had made with respondent for repair of the spillway baffle deck. The contract contemplated that Larson would inform respondent of all steps he proposed to take affecting the operation of the spillway dam, and respondent's employee Leonti acted as liaison between Larson and those employees of respondent concerned with the operation of the dam (R. 51-53).

4. *Duties of a Defendant.*

(a) A defendant must have had ". . . a primary control of the physical instrumentalities immediately in use and which are the media of the injuries or death giving rise to a claim for damage . . ." (*Myers v. Staub* (supra) at p. 276; *Byers v. Hardy* (supra))

(b) The court below found that Bonneville Dam was under the ownership and control of respondent (R. 50). Respondent's employees had exclusive control over the opening and closing of the dam gates which regulated the flow of the river and the turbulence of the water being discharged through the gates (R. 52, 57). The court below found that the immediate cause of the accident was the turbulent condition of the water (R. 55).

5. *A Defendant's Active Operations.*

(a) The instrumentality causing the injury must be actively operated by a defendant in a way directly

affecting the plaintiff, and such operation must have been contemplated between the defendant and the plaintiff's employer, as distinguished from a situation where the defendant is engaged in no active operation and its equipment is inert. (*Tamm v. Sauset*, 67 Or. 292, 135 P. 868; *Walters v. Dock Commission* (supra); *Myers v. Staub* (supra); *Warner v. Synnes*, 114 Or. 451, 230 P. 362, 235 P. 505.)

(b) Again, the findings of fact demonstrate that respondent's operation of the dam and its exclusive control over the discharge of waters therefrom directly affected petitioner's decedent in the performance of his work for Larson. Finding of Fact No. 5 states: "It [the contract] further contemplated that the construction of the cofferdam would be commenced while water was being necessarily discharged through the spillway dam, until such time as the flow of the river would recede to a point where the entire flow could be handled through the powerhouse" (R. 51).

Thus, the evidence and the findings of fact meet all the requirements of the Oregon law for holding that respondent was subject to the duties imposed by the Employers' Liability Law of Oregon, and particularly that its duty to petitioner's decedent was to ". . . use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices" (ORS 654.305).

Nevertheless, as an alternate ground, the trial court in its opinion stated that the Employers' Liability Law ". . . is not applicable for the reason that the Government was not responsible for the work there being performed . . . " (R. 47). The court made findings to the effect that there were no employees of the United States engaged in the sounding operation which resulted in the death of petitioner's decedent, and that there was no intermingling of employees of the United States with employees of the independent contractor in connection with the work then being performed (R. 58-59). The trial court further found that respondent was not in charge of, responsible for or engaged in the work being performed by Larson which resulted in the fatal accident (R. 59).

The fatal defect in these findings is that under the Oregon authorities above cited, it was not necessary for petitioner to show that employees of respondent and Larson physically intermingled in connection with the work being performed by Larson and his employees in order for petitioner's decedent to be under the protection of the Employers' Liability Law. Nor was it necessary to show that respondent was in charge of, or responsible for, the work then being done by Larson and his employees. The important fact was that the respondent had control of and was engaged in the operation of the dam, and that this involved risk and danger to Larson's employees who were required in the course of their work to be in the vicinity of the turbulent waters of the spillway. The United States not only controlled the active dam operation and regulated the turbulence of the waters

through the opening and closing of the dam gates, but also knew that Larson's operations and plans required some of his employees to venture into an area of risk and danger created and maintained by respondent.

An Oregon case closely in point is *Walters v. Dock Commission*, 126 Or. 487, 266 P. 634, 270 P. 778. In that case, the Portland Dock Commission maintained a dock adjacent to a milling plant. A spur track was located on the dock and crossed the roadway leading over the dock to the plant. On the day of the accident the roadway leading to the plant was blocked by empty cars on the track. Decedent, a plant employee, attempted to move one of these cars. At that moment, defendant's employees, at the other end of the track, ejected another railroad car which rolled down an incline and collided with standing cars, causing the leading car to strike and kill the decedent. The court held that defendant in its operation of propelling freight cars down the track knew that the milling company's employees occasionally moved cars at the other end, and that the jury was entitled under the evidence to find that defendant owed to plaintiff's decedent the high degree of care prescribed by the Employers' Liability Law. There was no intermingling of employees of the Dock Commission and the milling company in the *Walters* case, nor was the Dock Commission responsible for, or in control of, the work being performed by the decedent in the scope of his employment for the milling company. Similarly, in the case of *Clayton v. Enterprise Electric Co.*, 82 Or. 149, 161 P. 411, which was followed by the Supreme Court of Oregon in *Myers v. Staub*, 201 Or.

663, 272 P.(2d) 203, there was no intermingling of employees of two different employers.

Thus, the district court's conclusion of law No. 5 to the effect that respondent ". . . was not responsible for the work being performed by plaintiff's decedents so as to be liable to them under the Oregon Employers' Liability Act" (R. 61) was induced by an erroneous interpretation of the Oregon law.

The final inquiry then is whether or not the evidence and the findings of fact affirmatively show that respondent performed its statutory duty and did use every device, care and precaution which it was practicable to use for the protection and safety of the life and limb of petitioner's decedent, without materially impairing the efficiency of the operation of the dam.

The findings demonstrate that the respondent's employee Leonti knew that Larson's employees proposed to take soundings in bay 9 and that Larson intended to take a tug and barge out on the water below the dam and push the barge into bay 9. Respondent knew that only gates 9 through 17 were to be closed for this operation; that gate 8 was open 32 inches and that approximately 5,700 cubic feet of water per second was being discharged therefrom; that gate 7 was open 55 inches and that 9,100 cubic feet of water per second was being discharged therefrom; and that gate 6 was open 32 inches and that approximately 5,700 feet of water per second was being discharged through this gate (R. 54, 56-57). Furthermore, Mr. Capps admitted that respondent could have closed one more gate had a request to do so been

made by the contractor (R. 142). The closing of gate 8 would have cut down the turbulence of the water immediately adjacent to gate 8, without increasing the flow of water in gates 1 to 7 (R. 142, 145), and such a closing would not have impaired the efficiency of the dam operation (R. 142).

Accordingly, there is overwhelming evidence in the record that respondent breached its duty to petitioner's decedent under the Employers' Liability Law in failing to close a sufficient number of spillway gates in and near the vicinity of the work being undertaken by Larson and his employees in order to furnish a quiet pool in which to work, or in failing to warn decedent's employer as to the dangerous condition created by the turbulent waters in the immediate vicinity of the place where respondent knew the work would be carried on. That the breach of this duty proximately caused the accident and the death of petitioner's decedent is established by Finding No. 16, which states (R. 56):

> "The immediate cause of the accident and the deaths of the men was the turbulent condition of the water, which made it impossible to control the movements of tug Muledozer and barge and caused the barge to strike the pier."

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit affirming the dismissal of this action by the Oregon district court should be reversed and remanded to the district court for an assessment of damages.

While application of the high standard of care prescribed by the Oregon Employers' Liability Law may result in the establishment in this case of "novel and unprecedented governmental liability," this Court stated in *Rayonier Incorporated v. United States*, 352 U.S. 315, 319:

> ". . . the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

Respectfully submitted,

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APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b).

> Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671.

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—
>
> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.
>
> * * * * *

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The Oregon Employers' Liability Act provides as follows:

654.305 *Protection and safety of persons in hazardous employment generally.* Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

654.310 *Protective measures to be observed regarding certain machines, equipment and devices which are dangerous to employes.* All owners, contractors, subcontractors or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four

times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6) All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power.

(7) In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the employes of the owner, contractor or subcontractor transmitting or using the electricity are liable to come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

654.315. *Persons in charge of work to see that ORS 654.305 to 654.335 is complied with. The* owners, contractors, subcontractors, foremen, archi-

tects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

654.320 *Who considered agent of owner.* The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe.

654.325 *Who may prosecute damage action for death; damages unlimited.* If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs, and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named.

654.330 *Fellow servant's negligence as defense.* In all actions brought to recover from an employer for injuries suffered by an employe, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employe was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act of any fellow servant done in obediance to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

654.335 *Contributory negligence*. The contrib utory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.